STATE OF MICHIGAN

COURT OF APPEALS

MARC BEGININ and BOOM BOOM ROOM LLC, Plaintiffs-Appellants, v THOMAS HOSPITALITY GROUP, INC., and MICHAEL E. SCHEID, Defendants-Appellees.	UNPUBLISHED December 4, 2014 No. 317515 Oakland Circuit Court LC No. 2010-109251-CK

Before: RIORDAN, P.J., and SAAD and TALBOT, JJ.

PER CURIAM.

Plaintiffs appeal the trial court's grant of summary disposition to defendants under MCR 2.116(I)(2). For the reasons stated below, we affirm.

I. FACTS AND PROCEDURAL HISTORY

In December 2006, plaintiffs[1] ("BBR") agreed to purchase a restaurant in Pontiac owned by T & F, Inc ("T & F"). Defendants[2] ("Thomas Hospitality") acted as the broker for the sale. The purchase contract required BBR to deposit $40,000 in Thomas Hospitality's escrow account. The $40,000 check, which BBR issued to Thomas Hospitality on January 12, 2007, was the subject of a separate escrow agreement signed by BBR and Thomas Hospitality. The agreement stated that the restaurant's landlord, ULD Partners ("ULD"), would be the beneficiary of the $40,000 deposit, in part because it was owed back rent on the property. The document further outlined specific "triggering events" that would require Thomas Hospitality to distribute the $40,000 held in escrow to ULD. It did not mandate that Thomas Hospitality segregate the

[1] Plaintiff Marc Beginin is the managing partner of Boom Boom Room, LLC. Because plaintiffs make no distinction between the claims of Beginin as an individual, and Boom Boom Room as a corporate entity, we refer to plaintiffs as "BBR" throughout the opinion.

[2] In a similar vein, BBR makes no distinction between its claims against Thomas Hospitality Group, Inc, and its owner, Michael Scheid. For this reason, we refer to defendants as "Thomas Hospitality" throughout the opinion.

$40,000 from other escrow monies held in the escrow account, and Thomas Hospitality did not create a separate account to receive the $40,000 deposit.

BBR and T & F's deal to purchase the restaurant fell apart in late 2007, which caused BBR to file multiple lawsuits. In conjunction with these actions, BBR demanded that Thomas Hospitality refrain from distributing the $40,000 from escrow until a court ruled on how or whether it should do so. However, in November 2008, Thomas Hospitality, believing that one of the "triggering events" specified in the escrow agreement had occurred, released the $40,000 to ULD.

In 2010, BBR sued Thomas Hospitality for breach of contract, and alleged, among other things, that Thomas Hospitality's distribution to ULD violated the purchase and escrow agreements ("the 2010 lawsuit"). Though the trial court rejected BBR's claims and granted summary disposition to Thomas Hospitality, our Court reversed that order and granted summary disposition to BBR.[3] The trial court subsequently ordered Thomas Hospitality to pay the $40,000 to BBR, which it did in February 2013.

However, BBR apparently did not find this relief adequate, as it filed this action in the Oakland Circuit Court two months after it received the payment. It claimed that Thomas Hospitality's payment of the $40,000 to ULD not only constituted breach of contract, but also conversion under MCL 600.2919a(1)(a).[4] BBR requested summary disposition per MCR 2.116(C)(9) and (C)(10). Thomas Hospitality responded with its own motion for summary disposition under MCR 2.116(I)(2), and argued that BBR's conversion claim was without merit because: (1) it had no obligation to return a specific check or specific monies to BBR; (2) it never converted the $40,000 for its own use, as that sum remained in its escrow account; and (3) it timely paid BBR $40,000 pursuant to the opinion of our Court.

The trial court held from the bench that while Thomas Hospitality breached its purchase and escrow agreements with BBR, this breach of contract was not conversion. It accordingly granted summary disposition to Thomas Hospitality under MCR 2.116(I)(2).

On appeal, BBR claims that the trial court erred when it granted of summary disposition to Thomas Hospitality, because Thomas Hospitality converted $40,000 under MCL 600.2919a(1)(a). It also makes two related arguments that it did not raise at trial, namely that Thomas Hospitality: (1) converted $40,000 under MCL 600.2919a(1)(b); and (2) converted $40,000 under common law. Thomas Hospitality asks us to uphold the judgment of the trial court, and makes the same arguments on appeal as it did at trial.

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[3] *Marc Beginin v Thomas Hospitality Group, Inc*, unpublished opinion per curiam of the Court of Appeals, issued October 11, 2012 (Docket No. 304903) p 1.

[4] BBR's complaint did not specify which section of MCL 600.2919a Thomas Hospitality allegedly violated, but because its complaint stresses that Thomas Hospitality converted the $40,000 for its *own* use, we analyze its claim under MCL 600.2919a(1)(a).

II. STANDARD OF REVIEW

A trial court's decision on a motion for summary disposition is reviewed de novo. *Gorman v American Honda Motor Co, Inc*, 302 Mich App 113, 115; 839 NW2d 223 (2013). "The trial court appropriately grants summary disposition to the opposing party under MCR 2.116(I)(2) when it appears to the court that the opposing party, rather than the moving party, is entitled to judgment as a matter of law." *Sherry v East Suburban Football League*, 292 Mich App 23, 34; 807 NW2d 859 (2011). "Issues raised for the first time on appeal are not ordinarily subject to review." *Booth Newspapers, Inc v Univ of Mich Bd of Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993).

Matters of statutory interpretation are reviewed de novo. *Madugula v Taub*, 496 Mich 685, 695; 853 NW2d 75 (2014). "[W]hen interpreting a statute, courts must ascertain the legislative intent that may reasonably be inferred from the words expressed in the statute, which requires courts to consider the plain meaning of the critical word or phrase as well as its placement and purpose in the statutory scheme." *In re AJR*, 496 Mich 346, 353; 852 NW2d 760 (2014) (citations and quotation marks omitted). "When the Legislature has not defined a statute's terms, we may consider dictionary definitions to aid our interpretation." *Autodie, LLC v City of Grand Rapids*, 305 Mich App 423, 434; 852 NW2d 650 (2014).

III. ANALYSIS

Conversion is a tort that provides a cause of action at both common law and under MCL 600.2919a.[5] Common law conversion "is any distinct act of dominion wrongfully exerted over another person's personal property." *Pamar Enterprises, Inc v Huntington Banks of Mich*, 228 Mich App 727, 734; 580 NW2d 11 (1998). MCL 600.2919a, among other things, allows a

[5] The distinction between "common law conversion" and "statutory conversion" under MCL 600.2919a used to be significant, because an older version of the statute stated that conversion only occurred where "another person" knowingly bought, received, or aided "in the concealment of any stolen, embezzled, or converted property." See *Head v Phillips Camper Sales & Rental, Inc*, 234 Mich App 94, 111; 593 NW2d 595 (1999). In 2005, the Legislature revised MCL 600.2919a and expanded its scope by adding section (1)(a), which permits recovery against "[a]nother person's stealing or embezzling or converting property to the other person's own use."

This addition to the statute makes the difference between the definition of "common law conversion" and "statutory conversion" one of form, not substance, because the statutory and common law definitions of "conversion" are now the same. See *Aroma Wines and Equip, Inc v Columbia Distrib Servs, Inc*, 303 Mich App 441, 448; 844 NW2d 727 (2013) (quotation marks omitted), lv gtd 852 NW2d 901 (2014) ("[c]onversion, both at common law and under the statute, is defined as any distinct act of domain wrongfully exerted over another's personal property in denial of or inconsistent with the rights therein").

plaintiff to recover treble damages for conversion if a defendant steals, embezzles, or converts property "to the [defendant's] own use."[6] In relevant part, it provides:

> (1) A person damaged as a result of either or both of the following may recover 3 times the amount of actual damages sustained, plus costs and reasonable attorney fees:
>
> (a) Another person's stealing or embezzling property or converting property to the other person's own use. [MCL 600.2919a.]

The purpose of MCL 600.2919a, then, is to punish wrongdoing and embezzlement by granting victims of conversion the possibility of treble damages.[7]

"To support an action for conversion of money, the defendant must have an obligation to return the specific money entrusted to his care. The defendant must have obtained the money without the owner's consent to the creation of a debtor and creditor relationship." *Head v Phillips Camper Sales & Rental, Inc*, 234 Mich App 94, 111–112; 593 NW2d 595 (1999) (citations and quotation marks omitted). When money is placed in a general deposit account, it will inevitably "mingle[] with the money of other depositors in a general fund chargeable with the payment of general deposits, possess[] no trust quality, and lose[] its special identity in its general comingling with the funds of the bank." *Owosso Masonic Temple Ass'n v State Savings Bank*, 273 Mich 682, 690; 263 NW 771 (1935). The effect of this comingling makes it impossible for a plaintiff who deposits money in a general deposit account to claim conversion of money placed in the account, as the defendant will not have "an obligation to return the specific money entrusted to his care." *Head*, 234 Mich App at 111.

Here, BBR unconvincingly claims that Thomas Hospitality converted $40,000 under MCL 600.2919a(1)(a) when it released $40,000 from its escrow account to ULD. As a

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[6] The meaning of "use" in the phrase "converting property to the [defendant's] own use" is unclear. Another panel of our Court, quoting *Random House Webster's College Dictionary* (1992), recently held that "[t]he term 'use' requires only that a person 'employ for some purpose[.]'" *Aroma Wines*, 303 Mich App at 448. The Michigan Supreme Court granted leave to appeal in September 2014, and asked the parties to address "the issue of the proper interpretation of 'converting property to the other person's own use,' as used in MCL 600.2919a." *Aroma Wines*, 852 NW2d 901 (2014). Accordingly, it is unclear whether the definition of "use" advanced by our Court is a proper interpretation of that word in the context of MCL 600.2919a. However, this issue is not relevant to the determination of this case, as we discuss at n 8, infra.

[7] See *New Properties, Inc v George D Newpower, Jr, Inc*, 282 Mich App 120, 137; 762 NW2d 178 (2009) (emphasis original) (noting that trial court "assessed treble damages against [the converter] as a *penalty*, not as a single award of damages. The purpose of this award extended beyond restoring [the victims of conversion] to their original condition. The award was intended to *penalize* [the converter]") (emphasis in original).

preliminary matter, Thomas Hospitality never had an obligation to return the specific $40,000 given to it by BBR for deposit in its escrow account. And the escrow agreement did not provide for segregation of the $40,000 from other monies contained in Thomas Hospitality's escrow account. Accordingly, BBR fails to show that Thomas Hospitality had "an obligation to return the specific money entrusted to [its] care." *Head*, 234 Mich App at 111.

More importantly, Thomas Hospitality never converted the $40,000 "to [its] own use" within any reasonable understanding of that phrase.[8] "Own" is defined as "of, pertaining to, or belonging to oneself or itself." *Random House Webster's Unabridged Dictionary* (1998). Here, the funds at issue never were "of, pertaining to, or belonging to" Thomas Hospitality—they were held in escrow, and eventually distributed to a third party, ULD. Again, Thomas Hospitality followed what it thought were the instructions of the escrow agreement, and distributed the money to the beneficiary of the funds in escrow, ULD, when it believed one of the "triggering events" occurred.

Thomas Hospitality's interpretation of the agreement's terms—though ultimately wrong[9]—was a plausible reading of a confusing contract, one with which the trial court that adjudicated the 2010 lawsuit concurred. The proper remedy for Thomas Hospitality's actions was a suit for breach of the escrow agreement—a suit which BBR has already won, and from which it received the $40,000 to which it was rightly entitled under the agreement. BBR cannot now demand an additional $80,000 by attempting to transform a valid breach of contract claim into a meritless conversion action.[10] To allow BBR to do so would pervert the purpose of MCL

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[8] Despite BBR's assertions to the contrary, our case is not identical to the MCL 600.2919a(1)(a) conversion claim adjudicated in *Aroma Wines*. That decision involved a warehouse-operating defendant who refused to allow the wine-merchant plaintiff to access its wines after plaintiff became delinquent in its storage payments. *Aroma Wines*, 303 Mich App at 443. The wine merchant then sued the warehouse operator for, among other things, conversion under MCL 600.2919a(1)(a). *Id*. at 444. As noted, in its decision, the panel focused on the definition of "use" contained in MCL 600.2919a(1)(a)—not "own"—and held that "use" "is defined as 'to employ for some purpose" or "[t]he application or employment of something[.]" *Id*. at 447–448.

Here, though Thomas Hospitality "used" the $40,000, in that it "employ[ed]" the money "for some purpose," it did not do so for its *own* purposes—it transferred the money to a third party, ULD. Accordingly, it cannot have converted the $40,000 "to [its] own use" under MCL 600.2919a(1)(a).

[9] See *Beginin*, unpublished opinion per curiam of the Court of Appeals, issued October 11, 2012 (Docket No. 304903) p 2.

[10] As noted, BRR did not claim that Thomas Hospitality committed common law conversion or violated MCL 600.2919a(1)(b) at trial. *Booth Newspapers*, 444 Mich at 234. These issues are therefore unpreserved and need not be addressed. In any event, the claims would fail for the reasons explained above.

600.2919a, which is to punish wrongdoing and embezzlement,[11] not grant a windfall to a party that believes its former contract partner misinterpreted the stipulations of the contract.

The trial court therefore correctly rejected BBR's claims and granted summary disposition to defendants under MCR 2.116(I)(2).

Affirmed.

/s/ Michael J. Riordan
/s/ Henry William Saad
/s/ Michael J. Talbot

[11] See *New Properties, Inc*, 282 Mich App at 137.